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No. 84-983 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOSEPH E. TODARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the court of appeals erred in reversing a district court order which precluded the government from introducing certain evidence at trial unless it agreed to afford use immunity to two prospective defense witnesses.

In February 1983 petitioner was charged in an indictment returned in the United States District Court for the Western District of New York with three counts of income tax evasion, in violation of 26 U.S.C. 7201, and three counts of filing false tax returns, in violation of 26 U.S.C. 7206(1). The government indicated that it would rely on the so-called "net worth method" of proof to demonstrate that petitioner had extensive unreported taxable income during the years in question. See *Holland* v. *United States*, 348 U.S. 121 (1954). Prior to indictment, petitioner asked the government to investigate the possibility that certain of his net worth increases reflected loans made to him by certain

individuals during the years involved. When two of those individuals declined to testify before a grand jury concerning the alleged loans, petitioner moved the district court to order the United States to grant the individuals use immunity so that they might testify at trial. The government opposed that motion, stating that it was unwilling to confer immunity because potential prosecution of the prospective witnesses could thereby be jeopardized (Pet. App. A2-A4).

On February 7, 1984, the district court issued an order prohibiting the government from introducing at trial any evidence tending to show that the two individuals had not made the alleged loans to petitioner, unless the government granted the requested use immunity to those persons (Pet. App. A12-A13). The court of appeals, finding jurisdiction under 18 U.S.C. 3731, unanimously reversed (Pet. App. A1-A9). It followed its holding in *United States* v. *Turkish*, 623 F.2d 769 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981), that a district court should not issue an order directly or indirectly compelling a grant of defense witness use immunity absent extreme and exceptional circumstances. The court concluded that such exceptional circumstances did not exist here (Pet. App. A8).

Petitioner contends (Pet. 7-10) that this case presents a situation where fairness dictates that the government be compelled to confer use immunity on prospective defense witnesses. Whatever the merits of petitioner's contentions, they are not now ripe for review by this Court.[1] The court of appeals' decision places petitioner in precisely the same position he would have occupied had the district court in the first instance denied his motion for an order compelling

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[1]It is now nearly two years since the indictment was returned and nearly a year since the district court's immunity order was entered. Further interlocutory review at this time would cause serious additional delay in the trial of the charges against petitioner.

the grant of use immunity. If petitioner is acquitted after trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review of the court of appeals' decision would be premature at this time.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JANUARY 1985

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[2]Because this case is in an interlocutory posture, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.